



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
c/o Attorney Christopher Meisel
7020 N Port Washington Rd., Suite 202
Milwaukee, WI 53217

DECISION

MDV-40/44764

PRELIMINARY RECITALS

Pursuant to a petition filed May 25, 2000, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Milwaukee County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on July 6, 2000, at Milwaukee, Wisconsin.

The issue for determination is whether the petitioner divested assets in order to be eligible for MA.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o Attorney Christopher Meisel
7020 N Port Washington Rd., Suite 202
Milwaukee, WI 53217

Represented by:

Christopher Meisel
Northeast Corporate Centre
7020 N Port Washington Rd., Suite 202
Milwaukee, WI 53217

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Pat Quezaire, ES Supervisor
Milwaukee County Dept Of Human Services
1220 W. Vliet St, 3rd Floor
Milwaukee, WI 53205

EXAMINER:

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Milwaukee County and is an institutionalized resident of a skilled nursing facility (SNF). Prior to entering the SNF, she lived in one half of a duplex that she owned.

2. Attorney Meisel, as the petitioner's representative, applied for MA for her on August 11, 1999. The MA was requested to begin on August 1, 1999.
3. On August 23, 1999, the county agency issued a negative notice to the petitioner informing her that her application for MA was denied, effective August 1, 1999, due to a divestment of resources, and that she would remain ineligible until November 1, 1999. MA card services would be provided until then. A copy of the negative notice was not sent to the representative, Mr. Meisel.
4. The county agency determined that the divestment consisted of the sale of her duplex at a rate determined to be less than fair market value. She was urged to apply effective November 1, 1999. The petitioner did become eligible for institutional MA as of November 1, 1999.
5. The petitioner filed an appeal with the Division of Hearings & Appeals on May 25, 2000.
6. The petitioner sold her residence on or about May 10, 1999 to an unrelated party for a gross sales price of \$72,500, and a net sales price after costs and commissions, of \$72,000.
7. The county agency determined that the tax assessed fair market value of \$95,900 was the actual fair market value for the petitioner's duplex. It subtracted the reported sale figure of \$72,500, to arrive at a determination that \$23,400 of the home's value had been divested as the duplex was sold for less than fair market value.

DISCUSSION

First, there is a question of jurisdiction. In order to be timely, an appeal of an action concerning MA must be made within 45 days of the effective date. Wis. Stat. §§ 49.21(1) & 49.45(5) (1995-96); Wis. Admin. Code § HFS 104.01(5)(a)3. (January 1997); Income Maintenance Manual, II-G-3.4.0; see also, 42 C.F.R. § 431.221(d) (1996); Wis. Admin. Code § HSS 225.01(4)(c) (February 1995). In this case, the County's action took place on August 23, 1999 and the appeal was not filed until May 25, 2000, which is far more than 45 days later.

Normally, this would deprive the Division of Hearings and Appeals (DHA) of jurisdiction to hear the matter. However, in this case petitioner's authorized representative was not sent notice of the County action. As discussed below, authorized representatives must be sent notice of County actions.

Mr. Meisel submitted a signed application for petitioner. Although he was the petitioner's authorized representative, he was never notified that a decision had been made. An individual of the MA applicant's choice must be allowed to assist and represent the individual in the application process. 42 C.F.R. § 435.908 (1996). The authorized representative chosen by the applicant is responsible for submitting the signed application and any required documents. See the Income Maintenance Manual, I-A-18.3.1. In order for the right to an authorized representative to be meaningful notices must be sent to the authorized representative. It is not enough to send notices only to the applicant. For this reason, the County may not now claim that the petition was untimely.

The asset limit for MA is \$2,000. §49.47(4)(b)3g, Wis. Stats. If a MA applicant, or person acting on the applicant's behalf, transfers assets for less than fair market value, the applicant is ineligible for MA for the number of months obtained by dividing the disposed amount by the statewide average monthly cost (currently \$3,726) to a private pay patient in a nursing home. §HFS 103.065(5)(b), Wis. Adm. Code; §49.453(3), Wis. Stats.; see also, MA Handbook, App. 14.5.2.

Such transfers are known as "divestments". A divestment is the transfer of income, non-exempt assets, and homestead property belonging to an institutionalized person or his/her spouse, by the institutionalized person, his or her spouse, or a legal representative, for less than the fair market value of the asset. See, MA Handbook, App. § 14.2.1.

The petitioner's representative appeared and argued that the agency had improperly determined the fair market value of the homestead property, and that part of the divestment arising therein, by using the tax assessment fair market value estimate, and not the actual sales price in the transaction of May 10, 1999.

The MA Handbook provides the following guidance, in the parts relevant here:

"Fair market value" is an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred.

"Divested amount" is the net market value minus the value received.

"Net market value" is the fair market value at the time of the transfer minus any outstanding loans, mortgages, or other encumbrances on the property.

"Value received" is the amount of money or value of any services received in return for the person's property....

See, MA Handbook, App. §§ 14.2.6 – 14.2.9.

Here, the agency concluded that the petitioner sold the property for less than its fair market value because her property tax assessor estimated her fair market value to be higher than the actual sale price obtained. The agency did not produce any evidence that it had considered any other factors in concluding that the sale was not conducted on the open market and that less than fair market value was received.

The petitioner's representative testified that the homestead was sold on the open market for fair market value to an unrelated third party, in an arm's length transaction. In an affidavit (Exhibit #2), the realtor stated that the duplex in general was in disrepair and had never been remodeled. Most of the rooms were in generally poor condition. The only bathroom in each half of the duplex was in an unfinished basement. The property had been shown at least 16 recorded times.

In effect, the agency estimated the net fair market value, and deducted an amount approximating the net sales proceeds to arrive at the amount divested. I conclude that no divestment occurred at all in the transfer of the homestead. The homestead was sold for fair market value, and the petitioner and her representatives took all reasonable steps to sell the home on the open market. No evidence presented establishes that the sale was anything other than a sale for fair market value at the time of the transfer.

CONCLUSIONS OF LAW

1. DHA has jurisdiction of this case, as the county agency did not send a copy of the negative notice to the petitioner's representative.
2. There was no divestment of assets as the petitioner sold her home at fair market value.

NOW, THEREFORE, it is

ORDERED

That the petition for review be remanded to the county agency to certify the petitioner for MA from August 1 through October 30, 1999, within 10 days from the date of this Order.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2001.

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
26/JAN

Cc: MILWAUKEE COUNTY DEPT OF HUMAN SERVICES
Christopher Meisel, attorney at law